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Supreme Court of The United States

October Term 1948

No. 21

MERREL P. CALLAWAY, AS TRUSTEE OF THE PROPERTY OF CENTRAL OF GEORGIA RAILWAY COMPANY, DEBTOR, ET AL., PETITIONERS

Vs.

L. O. BENTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF PETITIONERS.

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Dated: September 1, 1948.

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I

REFERENCE TO REPORTS OF OPINIONS DELIVERED IN COURTS BELOW.

L. O. Benton, Jr., et al., Appellants, v. Merrel P. Callaway, as Trustee, et al., 165 F. (2d) 877.

Merrel P. Callaway, as Trustee, v. L. O. Benton, Jr., et al. (U.S. District Court Southern District of Georgia) not reported; see Findings of Fact and Conclusions of Law, R. 34-69. Judgment R. 69.

L. O. Benton, Jr., et al. v. South Western Railroad Company, et al. (Superior Court of Bibb County, Georgia)—not reported—Opinion and Order R. 20-22.

II

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals, Fifth Circuit, in question, under Judicial Code 240, as amended (U.S.C.A. Title 28, Sec. 347); and the Writ of Certiorari has been granted by this Court.

III

STATEMENT OF THE CASE.

This Court has granted the Writ of Certiorari to review the decision of the United States Circuit Court of Appeals rendered January 3, 1948 (R. 183-204), and the judgment entered January 13, 1948, (R. 204) in the case of L. O. Benton, Jr., et al., Appellants v. Merrel P. Callaway, as Trustee, et al., Appellees.

There are no facts in dispute. The facts are contained in the Findings of Fact by the District Court (R. 43-55) and in a Stipulation (R. 71-76).

The Suit of L. O. Benton, Jr., et al.

March 25, 1947, L. O. Benton, Jr., et al., as Stockholders of South Western Railroad Company (hereinafter called "South Western") brought a petition in Equity, in behalf of themselves and others similarly situated who cared to intervene, against South Western, its Officers and Directors in the Superior Court of Bibb County, Georgia, (R. 98-121). The grava-

men of this suit is that South Western has no power under its Charter or any amendment thereof, to transfer its railroad properties. The Charter of South Western and the amendments thereof are silent on this subject. (R.44). A meeting of Stockholders of South Western was to be held March 28, 1947, to consider whether they would assent to the acceptance of the plan of reorganization of Central of Georgia Railway Company (hereinafter called "Central"), which contemplated, as hereinafter more fully set forth, the acquisition by the reorganized Company of the railroad properties of South Western.

The prayers of the Benton petition were (1) that the Officers and Directors of South Western be enjoined from holding the Stockholders' meeting on March 28, 1947, and from submitting to such meeting the proposed Plan to sell the railroad properties of South Western Railroad Company, (2) that if the Stockholders' meeting should be held and that if at that meeting a mere majority of Stockholders should vote in favor of the acceptance of the Plan of Reorganization, that the Officers and Directors of the South Western should be enjoined from carrying the action of the Stockholders into effect, and (3) that they should be "specifically restrained and enjoined from doing and performing any act in behalf of South Western Railroad Company which might tend to consummate the Plan of Reorganization of Central of Georgia Railway Company, with respect to the acquisition of the properties of South Western Railroad Company". (R. 115-116).

The rule to show cause on this petition why an interlocutory injunction should not be granted was ar-

gued before the State Court on March 26th and 27th, 1947. But the interlocutory injunction prayed for was not granted until later, as hereinafter set forth. The Stockholders' meeting was held on March 28, 1947, and the acceptance of the Plan of Reorganization was assented to by them by a large majority, as hereinafter set forth.

The Proceeding Brought by Merrel P. Callaway, as Trustee of the Debtor.

April 18, 1947, Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, brought a summary proceeding in the United States District Court for the Southern District of Georgia, Savannah Division, in which the proceedings for the reorganization of the Railroad were pending, against the parties in the above stated case of L. O. Benton, Jr., et al. This petition alleged that the Bankruptcy Court had exclusive and prior jurisdiction over the subject matter of the suit in the State Court of L. O. Benton, Jr., et al., and that said suit was brought for the purpose of interfering with and preventing the reorganization plan of the Central as it related to South Western, and prayed that the Plaintiffs in the suit might be perpetually enjoined from the further prosecution of their suit in the Superior Court of Bibb County, or any other similar suit elsewhere than in the Bankruptcy proceedings in the United States District Court for the Southern District of Georgia, Savannah Division (R. 1). A temporary restraining order was issued on this petition April 18, 1947, against the Plaintiffs in the Benton suit (R. 7).

The Injunction Granted by the Judge of Bibb Superior Court of his own Motion.

Judge Atkinson, the Judge of the Superior Court of Bibb County, of his own motion, on April 24, 1947, rendered an opinion in the Benton case, in which he held that South Western had no power to sell its property; and issued an order enjoining South Western and its Officers and Directors from conveying the railroads of South Western to the reorganized Central Company, unless "authorized by a unanimous vote of the stockholders of the Defendant Company"; and this injunction order further provided "such officers and directors be and they are hereby restrained and enjoined from doing or performing any act in behalf of the Defendant Railroad Company which might tend to consummate the plan of reorganization of the Central Company, with respect to the acquisition by that Company of the properties of South Western Railroad Company". (R. 173-176). This injunction order was issued out of the Superior Court of Bibb County about 6 days after the United States District Court had restrained the Plaintiffs in the Benton case from proceeding with their case in the State Court (R. 7-9).

Amended Petition of Merrel P. Callaway, Trustee.

After the temporary restraining order was granted by Judge Atkinson of the State Court, Merrel P. Callaway, as Trustee, amended his petition on May 26, 1947 (R. 23) and called to the attention of the Court the fact that the Judge of the State Court had of his own motion on April 24, 1947, granted an interlocutory injunction in the Benton case. This amendment alleged that the interlocutory order of the Judge of the Superior Court of Bibb County was in excess of its jurisdiction

and invaded the exclusive jurisdiction of the United States District Court in the Bankruptcy Proceedings and was an attempt to prevent the South Western from accepting the Plan of Reorganization of the Central.

This amended petition prayed:

(a) That this Court will adjudicate the question whether, under the laws of the State of Georgia under the circumstances of this case, unanimous consent of the stockholders of South Western Railroad Company is a condition precedent to the acceptance of said Plan of Reorganization by South Western Railroad Company, and the consummation of said Plan by the conveyance of its property to the reorganized Company; and that if it is the law of Georgia that unanimous consent of stockholders is necessary in the premises, that this Court as a Court of Bankruptcy, under the powers conferred on it by the Bankruptcy Acts, and under the relevant provisions of the Interstate Commerce Act, both of which Acts are superior to State laws within their respective domains, will declare and decree that under said Acts, in the interest of reorganization and in the interest of the public, that South Western Railroad Company may accept and consummate the said Plan of Reorganization by a conveyance of its property to the reorganized Company, notwithstanding any such law of the State of Georgia, and that any such law is superseded by the provisions of said Federal Acts and is of no force and effect in the premises;

(b) That the order passed April 24, 1947, by the Judge in the suit in the Superior Court of Bibb County may be adjudged to be null and void, and that if and

when the Plan of Reorganization of the Debtor is confirmed, such orders may be passed in the premises as will make effective the acceptance and consummation of said Plan by South Western Railroad Company, its Officers and Directors (R. 24).

The said petition of Merrel P. Callaway having come on to be heard and evidence having been taken, the case was argued by Counsel and the Court thereupon, in conformity with his opinion rendered August 15, 1947, (which is contained in the Record, pp. 34-69), issued a perpetual injunction against the Plaintiffs in the Benton case and against the stockholders who had intervened therein, enjoining them from prosecuting their case, or any other similar case, in the Superior Court of Bibb County, Georgia, or elsewhere than in the Bankruptcy proceeding in the United States District Court. It was further ordered that the injunction granted by the State Court in the Benton case on April 24, 1947, was null and void. (R. 69).

L. O. Benton, Jr., et al., appealed from the above stated final order of the United States District Court to the United States Circuit Court of Appeals, Fifth Circuit, and the judgment of the District Court was reversed by the Court of Appeals and this judgment of reversal is the matter complained of here.

The Reorganization Plan of the Central.

The Reports of the Commission on the Plan are contained in 261 I.C.C. Rep. 203, 501, 627, and the Plan itself is reported 261 I.C.C. Rep. 515, Appendix 3 (R. 73). These reports were put in evidence and it was stipulated may be referred to by either party (R. 73).

The Central is the Debtor in a Reorganization Proceeding of a railroad, pending in the United States District Court for the Southern District of Georgia, Savannah Division, brought under Section 77 of the Bankruptcy Act as amended, and Merrel P. Callaway is the Trustee of the property of the Debtor in this proceeding. In this proceeding a Plan of Reorganization has been proposed by the Interstate Commerce Commission and approved by the Court June 24, 1946, under which South Western is offered $2,200,000 of the First Mortgage 4% Bonds and $1,770,000 of 4½% Income Bonds of the reorganized Company for the railroads and appurtenances of South Western and its real estate (Petition of Callaway, R. 1 and Answer of Benton, R. 11). This allotment was approved by the District Court in its approval of the Plan June 24, 1946, and there was no appeal from this judgment of the Court. (R. 48).

The Plan provides with respect to the Leased Lines of the Debtor (R. 46-47):

> "Prior to or upon consummation of the plan the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the South Western Railroad Company, The Augusta and Savannah Railroad, and the Chattahoochee & Gulf Railroad Company; provided, however, that this provision, so far as it concerns the Chattahoochee & Gulf Railroad Company may, in the discretion of the reorganization managers, be disregarded if the reorganized company shall not acquire the railroads of the South Western Railroad Company. If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased-line security

holders, then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation of the plan as the court may direct. The method of acquisition, whether through purchase, merger, or consolidation, shall, subject to the approval of the Commission and the court, be determined by the trustee or by the reorganization managers when they begin to function.

"If the leased lines are acquired, the railroads of each of the three and the personal property appurtenant thereto and all of the real estate owned by each lessor shall be conveyed to the reorganized company; each of said lessors shall waive any damages to which it has become or shall become entitled on account of any breach of lease; and the South Western Railroad Company shall waive all claims in respect to equipment. Such conveyances and waivers shall in each instance be on the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it, as hereinafter specified.

"Securities allocated to the leased lines shall not bear interest or dividends for any period prior to acquisition of the respective leased line."

The last provision of the Plan is as follows (R. 47):

"That nothing herein contained shall be, or be construed as, a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation, or merger of the debtor's property, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act, until further action by this Commission upon confirmation of the plan by the court."

The Commission in the last sentence of its Report on the Plan, states (R. 47) "We find that the plan herein approved would be compatible with the public interest".

The Commission in its Report on the Plan stated "The Plan approved makes provision *** for consolidation, merger or purchase of transportation properties of Lessors in lieu of continued operation under leases, if the leased properties can be acquired on the terms set forth in the plan". (R. 47).

"The construction of the Plan by the Court, whether before or after submission of the Plan to the creditors shall be final and conclusive" (R. 73).

"The carrying out of the Plan shall be as provided in the Bankruptcy Act" (R. 73).

On pages 72 and 73 of the Record appears a quotation by the Commission of the Plan proposed by the Debtor's Trustee, but the last paragraph of the quoted matter is not in the Commission's Plan; nor is the last clause in the first paragraph which reads "in order that it may be accomplished by a method which will be most advantageous to the reorganized Company" in the Commission's Plan.

The capitalization of the reorganized Company is fixed on the theory that the railroad property of South Western will be acquired by the reorganized Company and that the acquisition will relieve the reorganized Company of rental and income taxes aggregating $411,500 per annum. The Plan provides for an issue by

the reorganized Company of $14,000,000 of First Mortgage 4% Bonds and $16,000,000 of Income 4½% Bonds, both issues to be secured by mortgages on the property of the reorganized Company, including the railroads of South Western (R. 50).

South Western and its Relations to the Central.

South Western was incorporated under the laws of Georgia December 27, 1845, (Acts 1845, p. 132). Its railroad mileage is 331 and its railroads lie generally between the Georgia lines and the Alabama lines of the Central system (R. 44). The Commission in its Report on the Plan stated with reference to South Western (261 I.C.C. Rep. p. 305): "This property is a large and important one comprising no less than 18.25 per cent of system mileage and carrying a comparable proportion of all system traffic." The railroads of South Western have been under lease to Central and its predecessor since 1869, and have been operated as a part of the system of the Central and its predecessor (R. 46). The Trustee of the Debtor adopted the lease of South Western for the duration of the Bankruptcy and the railroads of South Western are in the possession of the Trustee and are operated by him (R. 45).

South Western not in Bankruptcy, but is a Party to the Reorganization Proceedings and a Creditor.

South Western is solvent and no Bankruptcy proceedings under Section 77 of the Bankruptcy Act have been instituted against it (R. 48).

South Western appeared specially in the Reorganization Proceedings and asked that its lease be adopted by the reorganized Company without change. All through the proceedings it has litigated the allotment

made to it in the Plan. It contested the Segregation Formula for the separation of earnings between the mortgaged and leased lines of the Debtor. It attacked the Severance Study introduced in evidence on the hearing of the Reorganization Plan. It has filed a claim for equipment which is yet undetermined. It filed a petition for a declaratory judgment as to its rights, in the event its lease was rejected, which petition was refused by the Court on the ground that this was a matter within the exclusive jurisdiction of the Commission (R. 48).

South Western is a "creditor" in the Bankruptcy Proceeding as that term is defined in Section 77 (c) of the Bankruptcy Act, by virtue of its claim for equipment, and as Lessor for its rent, and if its lease is rejected it has a claim for damages.

Acceptance of Plan by South Western and its Stockholders.

February 11, 1947, the Interstate Commerce Commission submitted the Plan of Reorganization of the Central to its creditors and leased lines for their acceptance or rejection on or before midnight March 28, 1947. The Plan was not submitted by the Commission to the stockholders of the South Western, but was submitted to the Corporation itself (R. 48, 49).

March 13, 1947, the Directors of South Western met and resolved that the Plan be accepted subject to the assent to said acceptance by the holders of a majority of South Western stock, as authorized by Section 94-328 of the Code of Georgia (R. 49). The stockholders of South Western met at the adjourned annual meeting held March 28, 1947, and assented to

the acceptance of the Plan, 30,137 shares of the stock being voted in favor of acceptance of the Plan, and 9,057 shares of stock voting against acceptance of the Plan (R. 49). The total Capital Stock of South Western is 51,911 shares (R. 44).

March 28, 1947, South Western, in accordance with the assent of the holders of a majority of the stock of South Western, mailed its ballot to the Interstate Commerce Commission accepting the Plan. After the creditors and leased lines had balloted on the Plan, the result was certified by the Commission to the United States District Court, and after hearing on June 4, 1947, the United States District Court on July 14, 1947, overruled all objections to the Plan and confirmed the Plan, reserving the question in this case for future disposition (R. 49, 50).

THE FINANCIAL POSITION OF SOUTH WESTERN, ITS OPERATING RESULTS, ITS INABILITY TO OPERATE ITS RAILROAD, AND ITS FUTURE PROSPECTS IF SEPARATED FROM CENTRAL.

(1) Financial Position.

The books of South Western show as of December 31, 1946, the book value of the road and equipment $9,523,736.81, which is made up of the Capital Stock $5,191,100, plus a write-up on the books of $4,247,661.27, which represents additions and betterments put on the property by the Lessees from 1869 to 1913, plus miscellaneous items of $84,975.54. The Interstate Commerce Commission's valuation — cost of reproduction, less depreciation; is $12,880,257.00. The book value and the Commission's valuation were both before the Commission and the Court when the allocation of

securities was made to South Western under the Plan. The books of South Western show as of December 31, 1946, total current liabilities of $216,085.22, investment in bonds, $1,096,197.87, and an unappropriated surplus of $5,433,641.31 (which includes the write-up of $4,247,661.27) (R. 50). The present cash position of South Western is derived in part from war earnings for the period June 19, 1940, to June 30, 1943, when South Western was operated by Debtor's Trustee for account of South Western (R. 52).

(2) Its Operating Results.

At normal levels of business the operation of South Western has resulted in large annual losses for many years in the past. During the war years South Western and other parts of the Central and railroads generally had large net earnings. The war years and the war traffic are gone, leaving behind the highest wage scale ever paid railroad employees, the highest prices ever paid by railroads for materials and supplies, and greatly reduced volume of business, both freight and passenger (R. 52). It is estimated that if the South Western had been operated by the Central for account of the South Western, there would have been an operating deficit of $442,754 for the year 1946, and for the first three months of 1947 an operating deficit of $201,348 (R. 51). The large operating losses appear in detail (R. 51).

(3) The Inability of the South Western to Operate its Property.

South Western has been operated under a lease by its Lessees since 1869 (R. 46). It has no operating organization and no equipment or appliances (R. 52). It would cost $10,000,000 to buy the necessary equipment (R. 52), and more than $9,000,000 for necessary capital and additions and betterments (R. 52, 53).

(4) Its Future prospects if Separated from Central.

The District Court in its Findings of Fact (R. 52) stated "A large part of the traffic of South Western is overhead or intermediate and largely competitive. From all of this (referring to the large annual losses for many years past from the operation of South Western), it is apparent that the operation of South Western as an independent line or by Central for account of South Western, is impractical from a financial standpoint". The District Court further found as a fact (R. 53) that "The South Western is in no position to operate its own property, and the probability is that the Central would be required to operate South Western for the account of South Western and the deficits would be charged to South Western and would be a lien on its property and, if history repeats itself, it seems that the deficits and necessary charges would finally exhaust the property".

There are four letters in the record written by the President of South Western to its Stockholders dated March 14, 1947, April 8, 1947, April 11, 1947, and April 17, 1947 (R. 80, 84, 87, 92), setting forth in detail the reasons which impelled the Directors of South Western to recommend to the Stockholders their acceptance of the Plan; their reasons being in substance that the Directors had exhausted all efforts to sell or dispose of the railroads of South Western, that it was impractical for South Western to undertake the operation of its railroad, that if operated by the reorganized Company for the account of South Western that the result would probably be disastrous, and that the risk was not justifiable, and that the Directors had held out to the last moment in the hope that they would

receive a better offer for the property, but the exigencies were such that it would be wise and expedient to accept the plan, otherwise there would be grave and unjustifiable risks (R. 53).

It is alleged in the petition filed in the Superior Court of Bibb County by L. O. Benton, Jr., et al, and admitted by South Western in its answer thereto, that the stockholders of South Western at their annual meetings held March 9, 1944, March 8, 1945, and March 14, 1946, had resolved that the proposed plan to purchase the South Western properties was grossly unfair and inadequate, and that the proposal was rejected. It was also alleged in said petition, and admitted by South Western in its answer, that at a meeting of the Directors of South Western held July 6, 1945, the decision was reached that it was not necessary for the South Western to take any action until the Plan had first been approved by the creditors, and was put up to the South Western for its acceptance or rejection. The Plan, however, contrary to this view of the Directors of South Western, was submitted by the Interstate Commerce Commission contemporaneously to the creditors of the Central and the leased lines. There is nothing in the Plan to indicate that the Plan would not be submitted to the leased lines until it had been approved by the creditors (R. 53, 54).

IV

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

(The assignments of error are not stated in the exact language, nor in the consecutive order in which the grounds of the Petition for Certiorari are stated,

but are in substance the same and are stated in the order in which they will be argued).

Error is assigned on the decision and judgment of the Circuit Court of Appeals as follows:

1. South Western is an important and integral part of the Central system, and its acquisition by the reorganized Company is an important part of the Plan of Reorganization and has been adjudged by the Commission to be in the public interest.

2. The purpose and effect of the Benton Case is to defeat the Reorganization Plan as it relates to South Western. The Benton case is not, as held by the Court of Appeals, strictly a suit in personam. Its objective was to prevent the disposition of property which is in the possession of the Bankruptcy Court and to destroy an important part of the Bankruptcy Proceeding. This cannot be lawfully done outside of the Bankruptcy Proceeding.

3. The Bankruptcy Court has exclusive and prior jurisdiction of the subject matter of the State Court suit.

4. The Bankruptcy Court has exclusive and prior jurisdiction by reason of its possession of the property of the Lessor which is to be acquired by the reorganized Company.

5. The subject matter over which the Bankruptcy Court has exclusive jurisdiction is the reorganization proceeding and the claims and controversies relating to

and affecting the formulation, acceptance and carrying out of the Plan; of which the acquisition of South Western is a part.

6. The holding of the Court of Appeals that the reversionary interest of South Western in its leased property was in the possession of South Western and not in the possession of the Bankruptcy Court, and that the reversionary interest was the thing which was to be acquired by the reorganized Company, and therefore the Bankruptcy Court had no jurisdiction over the disposition of this reversionary interest is erroneous on three separate grounds:

(a) The reorganized Company is seeking to acquire the railroads of South Western which are in the possession of the Court; not only the reversionary interest of the Lessor, but the leasehold interest of the Central; and it is not permissible to carve up these two interests and treat them separately; (b) This view of the Court of Appeals involves a total misconception of the scope of a reorganization plan and the function of the Bankruptcy Court; (c) The acquisition of railroad property is a matter within the exclusive and plenary jurisdiction of the Interstate Commerce Commission and is wholly beyond the jurisdiction of the State Court in the Benton suit.

7. The exclusive jurisdiction of the bankruptcy court in this case rests upon the express provisions of the Bankruptcy Act with respect to the reorganization of railroads, which authorizes a plan of reorganization modifying or altering the rights of creditors generally or any class of them; rejecting the contracts of the

debtor, which are executory in whole or in part, including unexpired leases; and defining "creditors" to include for all purposes of the Act all holders of claims of whatever character against the debtor "including the holder of a claim under a contract executory in whole or in part, including an unexpired lease."

8. The exclusive jurisdiction of the Bankruptcy Court and the Commission rest on the proposition that the acceptance or rejection of the plan of reorganization of the Debtor by South Western and the disaffirmance of its lease in the event it rejects the plan, the waiver of damages for the breach of the lease and the waiver of its claims for equipment, and the validity of the South Western's acceptance and the consummation of the acceptance are all within the frame work of the plan of reorganization.

9. The Court of Appeals erred in holding that a summary proceeding, by ancillary petition in the Bankruptcy Court did not lie to protect its jurisdiction.

10. The powers of the Bankruptcy Court and the powers of the Interstate Commerce Commission are brigaded for the purposes of reorganization. The jurisdiction of the Commission under Section 5 of the Interstate Commerce Act in the matter of merger or consolidation of carriers or the aqcuisition of one carrier by another, is exclusive and plenary and the Benton suit and the injunction issued by the State Court in that suit transgress the jurisdiction of the Commission and undertake to prejudge a question which is within the exclusive power of the Commission; and the Bankruptcy Court had power to enjoin the State Court proceeding on this ground.

11. Section 5 (11) of the Interstate Commerce Act prescribes the vote on which one carrier may acquire the property of another, and under this Section carriers are relieved from the "restraints, limitations and prohibitions of law, Federal, State or municipal in so far as may be necessary" to enable carriers to carry into effect the acquisition of one carrier by another. The Court of Appeals failed to give effect to this Statute. The Benton suit usurps the power conferred on the Commission.

12. The Benton case and the injunction of the State Court Judge therein and the decision of the Court of Appeals are contrary to and do not consider (1) the provisions of Sub-section (b) of Section 77 of the Bankruptcy Act which provides that a plan of reorganization "shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the Debtor to another Corporation or Corporations, the merger or consolidation of the Debtor with another Corporation or Corporations, ***"; (2) the provisions of sub-section (f) of Section 77 of the Bankruptcy Act, which grant authority to carry out the plan under the supervision and control of the judge, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding"; and (3) the provisions in the plan which give the District Court power to construe it and put it into effect.

13. The Court of Appeals erred in stating in its opinion "For the Bankruptcy Court to hold that a majority vote of the stockholders of South Western would be sufficient, regardless of State law, would

amount to amending the Plan in the face of the Statute which provides that no plan shall be approved or confirmed by the Judge 'unless the plan has been approved by the Commission and certified to the Court' ". The plan was promulgated by the Commission and the Court approved it June 24, 1946, before the Benton suit was commenced (R. 46). The decision of the Bankruptcy Court that South Western had power to convey its property on the vote of a majority of its stock and without unanimous stockholder consent is in no sense an amendment of the plan.

14. The Court of Appeals erred in holding that the question submitted in the Benton case to the State Court "was peculiarly a question of State law". It would have been if it had been disassociated from the reorganization plan. It was purely a question of Federal law whether in pursuance of the plan the acceptance of South Western was valid and sufficient and was a matter over which the Commission had exclusive jurisdiction.

15. The observation of the Court of Appeals in the majority opinion that "A solvent corporation *** cannot be constitutionally compelled against its will to convey to the Debtor" is irrelevant. No one is seeking to compel South Western to convey its property against its will. It has offered to do so by the vote of a large majority of its stock. A small minority of stockholders is trying to prevent the corporation from consummating its wishes, on the theory that a conveyance cannot be made without unanimous stockholder consent.

16. The observation of the majority opinion of the Court of Appeals that "There is nothing in the plan

to indicate that an ultra vires acceptance is authorized or required or that any State law which prohibits acceptance should be disregarded. The plan does not provide that the leased lines may be acquired by a simple majority vote of the stockholders of the Company". Naturally, the plan does not carry any such provisions. The Federal Statutes which have been quoted above confer on the Commission exclusive and plenary power over the acquisition of the property of one carrier by another, and it is presumed that when the plan is to be consummated the Commission will pass on the question whether the acquisition can be effected, and if there is any such obstacle in the State law as that it requires unanimous stockholder consent, the Commission has ample power, if it holds that the acquisition is in the public interest, to disregard any such unreasonable obstacle.

17. Under the provisions of Sections 94-328, 94-329, 94-311 and 94-318 of the Code of Georgia (which are copied in the Appendix No. 2 of this brief) South Western is authorized to sell its property to the reorganized Company with the assent of the majority of its stock.

18. Under the exigencies which confront South Western it has power under Georgia law to convey its property on the vote of a majority of its stock, and this question the Bankruptcy Court had the power to decide, all the parties being before the Court; and the Court of Appeals should have affirmed the judgment of the District Court in this respect.

V

THE ARGUMENT

I

SOUTH WESTERN IS AN IMPORTANT AND INTEGRAL PART OF THE CENTRAL SYSTEM, AND ITS ACQUISITION IS AN IMPORTANT PART OF THE PLAN OF REORGANIZATION, AND HAS BEEN ADJUDGED BY THE COMMISSION TO BE IN THE PUBLIC INTEREST.

The lines of South Western have been operated under lease as a part of the Central system since 1869. The lines of South Western lie between and connect the Georgia and Alabama lines of the system. The Commission said (261 I.C.C. Rep. p. 305) with reference to South Western "This property is a large and important one comprising no less than 18.25 per cent of system mileage and carrying a comparable proportion of all system traffic".

The Plan makes an offer to South Western to acquire its property and is not compulsory. Disaffirmance of the lease was to be the last resort. The Plan further provides that if South Western does accept, it shall waive all claims for damages for the breach of its lease and all claims for equipment. The Plan specifically provides "The Debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to South Western Railroad Company". The Plan further makes provision for first mortgage bonds and income bonds to be secured by mortgages on all the railroad properties to be acquired by the reorganized Company (including South Western's railroads), and South Western's allotment is made from these bonds. A part of the result of the acquisition to

the reorganized Company is that it would relieve the reorganized Company of rental and income taxes aggregating $411,550 per annum.

The Commission obviously thought that the acquisition of South Western by the reorganized Company was in the mutual interest of both the South Western and the reorganized Company, particularly in view of the fact that South Western was in no position to operate its own properties. The Commission said in its Report, 261 I.C.C. Rep. p. 308, "The record does not support a conclusion that severance would be practicable or of advantage to either the lessor or the debtor". The Court of Appeals in its opinion said "The importance to the Debtor of acquiring South Western is indicated by the fact that, if it fails to do so, the provision for the acquisition of the Chattahoochee & Gulf Railroad Company may be disregarded".

The Commission found that the Plan as a whole was in the public interest which necessarily included the acquisition of South Western.

If the leased lines cannot be acquired, nevertheless, the balance of the Plan of Reorganization would be operative. That is implicit in the provision in the Plan that if any of the leased lines cannot be acquired its lease would be cancelled. However, it clearly appears that the Commission thought acquisition was in the public interest and in the interest of the parties and made provision for the carrying out of the Plan on that theory.

II

THE PURPOSE AND EFFECT OF THE BENTON CASE IS TO DEFEAT THE PLAN OF REORGANIZATION AS IT RELATES TO SOUTH WESTERN.

According to the petition in the Benton case, there can be no sale or lease or consolidation of the properties of South Western, even on unanimous stockholder vote, because there is no power conferred by the Charter of South Western. But, according to Judge Atkinson's injunction, such disposition of the South Western's railroads would require unanimous stockholder consent. In either event it would be impossible to dispose of South Western. The prayers of the Benton petition and Judge Atkinson's injunction are aimed at making it impossible for South Western to accept the reorganization plan and in terms the injunction order prohibits the carrying out of the plan as it relates to South Western without unanimous stockholder consent.

If the complainants in the Benton case should get a decree that South Western could not dispose of its property without unanimous stockholder consent, they would then be in a position from which they could not extricate themselves or the Company, and the result would be that they would win their case, but would in all likelihood lose their property. South Western was authorized by its Stockholders at an annual meeting in March 1945 to sell or lease its property on more advantageous terms than those offered in the Central's reorganization plan (R. 85), but after diligent efforts, neither a lessee nor a purchaser could be found (R. 86). In the Benton petition reference is made to several meetings of Directors and Stockholders of South West-

ern at which they voted to reject the plan of reorganization. But all of these meetings were held before the Commission submitted the plan to South Western February 11, 1947, for its acceptance or rejection. It was finally accepted March 28, 1947. The four letters written by the President of South Western to its Stockholders shortly after the acceptance of the plan, explain why at the earlier meetings they had voted to reject the plan, the reason being that they were trying to sell or lease the property on more advantageous terms than offered in the plan. Benton has been a stockholder of South Western since 1932 (R. 161) and he must have known about the efforts to sell the South Western property. When these efforts failed and the Directors of South Western recommended the acceptance of the Plan, Benton, et al., tried to torpedo the Plan. If they succeed they will certainly be out on a limb.

The Court of Appeals held that the Benton suit was strictly a suit in personam. While it was a suit in personam in the sense that it was brought against certain persons, the objective of the suit was through the process of injunction to destroy the reorganization plan as it relates to South Western. The fact that the suit was in personam does not excuse it as an invasion of the exclusive jurisdiction of the Bankruptcy Court and the Commission.

III

THE BANKRUPTCY COURT HAS EXCLUSIVE AND PRIOR JURISDICTION OF THE SUBJECT MATTER OF THE STATE COURT SUIT.

The subject matter over which the Bankruptcy Court has exclusive jurisdiction is the reorganization

proceeding and the claims and controversies relating to or affecting the formulation, acceptance and carrying out of the reorganization plan, of which the acquisition of South Western is a part.

The acceptance or rejection of the Plan by South Western, the disaffirmance of the lease if South Western rejects the Plan, the waiver of damages for the breach of the lease, the waiver of the South Western's claim for equipment, the validity of the acceptance of the Plan by South Western, and the consummation of the acceptance of the Plan are all within the frame work of the Plan.

The Court of Appeals seeks to uphold the jurisdiction of the State Court on the theory that the reversionary interest of South Western in its leased property is in the possession of South Western, and that the reversionary interest is the thing which is to be acquired by the reorganized Company and, therefore, the Bankruptcy Court had no jurisdiction over the disposition of this reversionary interest. There are three fallacies in this.

The reorganized Company is seeking not only to acquire the reversionary interest of South Western, but it is seeking to acquire the leasehold interest of the Debtor. The South Western's railroads and appurtenances are the things which the reorganized Company is to acquire. It is not permissible to split up the property into two separate interests and to say that one interest is in the South Western and the other interest is in the Debtor. The Bankruptcy proceeding is concerned with the disposition of the property as a whole.

The Court of Appeals went off on the theory that this was an ordinary bankruptcy proceeding and that the South Western was an adverse claimant of property not in the possession of the Bankruptcy Court, which is a total misconception of the function of a reorganization proceeding, and of the relation of South Western to the Bankruptcy proceednig.

As we shall presently show, the acquisition of the property of a railroad carrier by another railroad carrier is a subject matter wholly beyond the jurisdiction of the State Court and within the exclusive jurisdiction of the Commission.

The Reorganization Court had inherent jurisdiction of this subject matter. The Court and the Commission were trying to perfect and consummate a reorganization plan in which the South Western was involved; therefore, the Reorganization Court necessarily drew to itself the decision of all questions affecting the transmission of the property from the South Western to the reorganized Company.

Section 77 (b) (5) provides the reorganization plan "shall provide adequate means for the execution of the plan, which may include *** the merger or consolidation of the debtor with another corporation *** may reject contracts of the debtor which are executory in whole or in part, including unexpired leases".

Moreover, by Section 2 (15) of the Bankruptcy Act (U.S.C. Title 11, Section 11), Courts of Bankruptcy are invested with such authority in equity as will enable them to exercise original jurisdiction in Bankruptcy

proceedings, including the power to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act". (See Continental Bank v. Rock Island Ry., 294 U.S. p. 676).

The jurisdiction and power of the Bankruptcy Court also rests on Section 262 of the Judicial Code (U.S.C.A. Title 28, Section 377), which authorizes United States Courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions". (See Continental Bank v. Rock Island Ry., 294 U.S. p. 675).

In the case cited below, certain Banks were in possession as pledgee of certain securities of the Rock Island Railway. The Bankruptcy Court enjoined the sale of the pledged securities on the ground that the sale would interfere with the Reorganization Plan. In the course of the opinion the Court said (p. 676):

> "It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained. As to that, it is not necessary to express an opinion. But a proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile."

The injunction was issued in a summary proceeding just as in this case.

Continental Bank v. Rock Island Ry.,
294 U.S. 648, 675.

This decision is a complete reply to the theory of the Circuit Court of Appeals in the case at bar, that the Bankruptcy Court did not have exclusive jurisdiction because the reversionary interest was in the Lessor. In the Rock Island case the possession of the securities was not in the Bankruptcy Court and the interest which the injunction reached was the interest in the securities of a pledgee and the pledgees were not parties to the Bankruptcy proceeding. In the case at bar, the fact that Benton, et al., Plaintiffs in the State Court suit, were not parties to the Reorganization case, does not prevent the Reorganization Court from reaching them with its injunction process. The majority opinion of the Circuit Court of Appeals completely ignores the Rock Island case, but Judge Hutcheson, of the Circuit Court of Appeals, in his dissenting opinion vigorously emphasizes it.

"It is the exclusive jurisdiction of the reorganization Court which gives it power to preserve the railway as a unit and as a going concern and to prevent it from being divided up and dismembered piecemeal. Only in that way can continuous operation of the road be assured and a plan of reorganization be effected which not only safeguards the interests of various claimants, but is also compatible with the public interest."

Gardner v. New Jersey, 329 U.S. 565, 577.

Christopher Engineering Company was being reorganized under Chapter 10 of the Bankruptcy Act in the United States District Court for the Eastern District of Missouri. Subsequently, on an involuntary petition in bankruptcy filed by its creditors, National Air Craft Corporation, a subsidiary of Christopher Company, was placed in bankruptcy in the District Court for the Southern District of Indiana. An order was entered in the bankruptcy proceeding of National directing that National's property be offered for public sale. On the day before the sale a petition was filed on behalf of National in the reorganization proceedings of Christopher in the Missouri District Court, which issued a decree finding that National was a wholly-owned subsidiary of Christopher, and enjoining the sale of National's property. The sale was, nevertheless, made, approved and confirmed. It was held that the order of the reorganization Court was binding on the Bankruptcy Court and was not there subject to be collaterally attacked, and that it was the duty of the Bankruptcy Court to obey the stay order of the reorganization Court, irrespective of whether the petition for reorganization of the alleged subsidiary had been properly filed, and that since the interested parties had an opportunity in the reorganization proceeding to secure a determination of the question whether a parent-subsidiary relationship existed between the Corporations, the same issue should not be tried collaterally in the bankruptcy proceedings.

Duggan, Trustee, v. *Sansberry, Trustee*,
327 U.S. 499.

The scope and extent of the jurisdiction in reorganization is illustrated in the two following cases, which held that although lease agreements had termi-

nated according to their own terms, the question still remained whether it was in the public interest that the leased property should be used in connection with the reorganization of the lessor.

Smith v. *Hoboken R. Co.*, 328 U.S. 123.

Thompson v. *Texas Mexican R. Co.*, 328 U.S. 134.

If a single stockholder of a leased railroad can hold up the inclusion of the leased line in the reorganization of the Debtor, when the great majority of the stockholders of the lessor have voted to accept the reorganization plan, there is something wrong with the mechanics of reorganization. If the State Court can dictate the conditions on which the plan may be accepted by the lessor, and can say that it cannot be accepted except by unanimous stockholder consent, then the State Court has the power to control and negative or break down the reorganization plan. If through the expedient of a litigation in the State Court between the lessor and its stockholders, the question can be determined as to whether the lessor can accept the plan, then this takes away from the reorganization Court its exclusive jurisdiction over the process of reorganization. The Bankruptcy Court is open and if a minority stockholder wishes to litigate the power of the corporation to accept the plan, he can go into the Bankruptcy Court and be heard. Necessarily, the reorganization Court draws to itself questions of this kind, both because it has exclusive jurisdiction over the subject matter and possession of the property.

IV

THE BANKRUPTCY COURT HAD EXCLUSIVE JURISDICTION BY VIRTUE OF ITS POSSESSION OF THE PROPERTY OF SOUTH WESTERN.

The Bankruptcy Court had physical possession of the railroads and other property of South Western which was to be acquired by the reorganized Company under the terms of the plan.

Counsel for Respondents argued in the Court of Appeals that the Bankruptcy Court was merely in possession of the leasehold interest of the Debtor and the Court of Appeals argues that the reversionary interest of South Western is not in the possession of the Court. The physical properties are in the possession of the Court, and that gives the Bankruptcy Court exclusive jurisdiction over the question of the disposition of the property, regardless of what kind of title the Debtor had. South Western was part of the system of railroads operated by the Debtor. This system of railroads went into the physical possession of the Bankruptcy Court. In the plan of reorganization it was decided that it was in the public interest that the reorganized Company should acquire the South Western if it could, and an offer was made in the plan to South Western. A small minority of South Western Stockholders go into the State Court for the purpose of breaking down the plan, on the theory that South Western has no corporate power to dispose of its properties which are in the possession of the Bankruptcy Court. It is elementary that the possession of the property by the Court gives it exclusive jurisdiction as to the question as to what disposition should be made of the property and that the Bankruptcy Court draws to itself the exclusive

right to determine whether unanimous stockholder consent is necessary before South Western can convey its property in pursuance of the provisions of the plan to the reorganized Company. In the Benton suit, the Bankruptcy Trustee is not made a party to the suit; it is merely a suit between the Corporation and its stockholders, and is predicated on the theory that the Bankruptcy Court has nothing whatever to do with the matter. Manifestly, the question of the power of South Western to dispose of the property which is in the possession of the Bankruptcy Court, and which is an important part of the reorganization plan is a question beyond the power and jurisdiction of the State Court. It is a question beyond the power of the State Court for two reasons; first, because the subject matter of reorganization is exclusively the province of the Bankruptcy Court, and secondly, because the property is in the possession of the Bankruptcy Court.

The Connecticut District Court imposed a lien on the Boston & Providence in favor of the New Haven for a deficit in operations of the former. The New Haven was lessee of the Boston and Providence and was in possession of its property. The lease was rejected by New Haven, but the Court required New Haven to operate Boston and Providence for account of the latter. A Trustee in Bankruptcy had been appointed by the Massachusetts District Court for Boston and Providence. The Court held that the Connecticut Court had power to impose the lien. The Court in the course of the opinion said "It is immaterial what title the Debtors had, whether a lease or a fee. The physical property covered by the lease was in the custody of the Connecticut Court by virtue of the provisions of Sec-

tion 77 (a). By virtue of sub-divisions 77 (c) (10) and 77 (c) (6), it is clear that leaseholds are in some instances to be operated by the lessee's trustees".

Warren v. *Palmer*, 310 U.S. 132, 138,

"Bankruptcy Courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of the jurisdiction is not title in but possession by the bankrupt at the time of filing the petition in bankruptcy."

Thompson v. *Magnolia Company*, 309 U.S. 478, 481.

This jurisdiction of the Bankruptcy Court extends to all property in the Debtor's physical possession *** In every case the Bankruptcy Court has power in the first instance to determine whether it has that actual or constructive possession which is essential to its jurisdiction to proceed.

Harris v. *Avery Brundage Co.*, 305 U.S. 160, 163.

V

SOUTH WESTERN IS A PARTY TO THE REORGANIZATION PLAN AND IS A CREDITOR IN THE REORGANIZATION PROCEEDING.

South Western has all through the proceeding contended that its lease should be continued and has litigated the allotment made to it under the plan. It filed a claim for a declaratory judgment as to its rights if its lease was rejected which was refused by the Court.

It is a "creditor" as that term is defined in Section 77 (b). "The term 'Creditors' shall include, for all purposes of this Section, all holders of claims of what-

ever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease."

South Western is a creditor, by virtue of its lease, for rent and if its lease is rejected it is a creditor for damages for the breach of the lease. It has a claim for equipment.

In the Milwaukee case, the Terre Haute was a leased line and the rental was the interest on the Terre Haute bonds. The Court held "The Terre Haute bondholders are 'creditors' of the debtor as defined in Section 77 (b) for they are holders of a claim under an unexpired lease".

Group of Investors v. *Milwaukee R. Co.*
318 U.S. 523, 549-555.

In the New Haven case the Court held that the Boston Terminal Company, the Trustee of its mortgage, and its bondholders were creditors of the New Haven. New Haven was obligated to use the terminal and pay its costs of operation. The plan undertook to modify the cost. The Court said (p. 424): "Although their claim is contingent and unliquidated, we think it plain that they are creditors within the statutory definitions. Indeed, the Appellees do not dispute this, but contend that the claim is not presently provable."

Old Colonoy Bondholders v. *New York, N.H. & H.R. Co.*, 161 F. (2d) 413, 424.

VI

THE PROVISIONS OF SECTION 77 OF THE BANKRUPTCY ACT AND OF THE REORGANIZATION PLAN, WHICH BEAR UPON THE JURISDICTION OF THE BANKRUPTCY COURT OVER THE CONVEYANCE OF THE PROPERTY OF SOUTH WESTERN IN PURSUANCE OF THE PLAN.

Sub-section (a) of Section 77 of the Bankruptcy Act provides: "The Court *** shall during the pendency of the proceedings under this Section and for the purposes thereof have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this Section all the powers not inconsistent with this Section, which a Federal Court would have had if it had appointed a receiver in equity for the property of the debtor for any purpose".

Sub-section (b) (5) of Section 77 of the Bankruptcy Act provides that the plan of reorganization shall provide adequate means for its execution which may include, "the merger or consolidation of the debtor with another corporation or corporations" and the plan may reject unexpired leases.

Sub-section (c) (6) of Section 77 provides, if the lease is rejected and if the lessee elects no longer to operate the leased line the Judge may require the lessor to operate the line for account of the lessee.

Sub-section (f) of Section 77 provides that upon confirmation of the plan the Commission shall grant authority for the "transfer of any property, sale, consolidaiton or merger of the debtor's property *** to the extent contemplated by the plan *** and the Judge

may require *** all other proper and necessary parties to make such transfer or conveyance".

Sub-section (f) of Section 77 further provides that upon confirmation of the plan the debtor and the corporation organized for the purpose of carrying out the plan shall put into effect and carry out the plan and order of the Judge relative thereto, "under and subject to the supervision and control of the Judge, *the laws of any State or the decision or order of any state authority to the contrary notwithstanding.*" (Italics ours).

The plan of reorganization provides (a) that the Debtor shall acquire the properties leased to the debtor by South Western, if they can be acquired on the terms stated in the plan; (b) that if the properties cannot be so acquired the lease shall be disaffirmed; (c) that the method of acquisition whether through purchase, merger or consolidation shall subject to the approval of the Commission and the Court, be determined by the Trustee or the reorganization mangers when they begin to function; (d) that if the leased lines are acquired they shall be conveyed to the reorganized Company; (e) that nothing in the plan shall be construed as a grant of authority for the issuance of securities, transfer of property or merger or consolidation until further action by the Commission upon confirmation of the plan by the Court; (f) that the carrying out of the plan shall be as provided by the Bankruptcy Act. The provision in sub-paragraph (e) above, paraphrases the provisions of Sub-section (f) of the Bankruptcy Act.

In view of these explicit provisions of the Bankruptcy Act and the plan, there can be no doubt about

the fact that the State Court in the Benton case ran headlong into the exclusive jurisdiction of the Bankruptcy Courts.

If there should be any such law or decision in the State of Georgia that South Western cannot convey its property without unanimous consent of its stockholders, we apprehend that the Bankruptcy Court would find no difficulty in setting aside any such law, as it has the explicit power to do under the provision in sub-section (f) of the Bankruptcy Act (quoted above).

VII

THE DISTRICT COURT HAVING POSSESSION OF THE PROPERTY AND EXCLUSIVE JURISDICTION OF THE SUBJECT MATTER, HAD POWER TO ENJOIN THE PARTIES IN THE BENTON CASE FROM PROCEEDING IN THE STATE COURT; AND JUDICIAL CODE SECTION 265 IS INAPPLICABLE.

In the Rock Island case this Court demonstrated the power of the Bankruptcy Court to protect by injunction its jurisdiction in reorganization (see especially pp. 675, and 676), and the Court concluded this Section of its opinion with the statement "The Bankruptcy Court, in granting the injunction, was well within its power, either as a virtual Court of Equity, or under the broad provisions of Section 2 (15) of the Bankruptcy Act or of Section 262 of the Judicial Code". It should also be remembered in this connection that the injunction in this case was directed against parties who were not in the Bankruptcy Court and who had possession of the property which was the subject matter of the injunction suit.

Continental Bank v. *Rock Island Ry. Co.*, 294 U.S. 648, 675-676.

Out of numerous cases on the subject of the power of the District Court to protect its jurisdiction by enjoining proceedings in the Sate Court, we have selected:

Kline v. *Burk Construction Co.*, 260 U.S. 226, 231.

Looney v. *Eastern Tex. R. Co.*, 247 U.S. 214, 221.

Ex Parte Baldwin, 291 U.S. 610, 615.

The Respondents argued at length in their brief before the Court of Appeals and in their brief on the petition for certiorari that Judicial Code Section 265 is applicable to a case like this. If there is one thing which is definitely settled by the decisions of this Court, it is that this Judicial Code Section is not applicable to a case like this.

Judicial Code Section 265 (28 U.S.C.A. Section 379) provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy".

The Statute itself excepts injunctions authorized by any law relating to proceedings in bankruptcy.

A Court of the United States is not prevented from enforcing its own judgments by this Statute.

Dietzsch v. *Huidekoper*, 103 U.S. 494, 497.

"The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties

or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice." *** Section 265 of the Judicial Code *** has repeatedly been held not applicable to such an injunction." (Citing many cases).

Looney v. *Eastern Tex. R. Co.*, 247 U.S. 214, 221.

"This Section (265) is to be construed in connection with Section 262 which authorizes the United States Courts 'to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and, agreeable to the usages and principles of law'. *** It is settled that where a federal court has first acquired jurisdiction of the subject matter of a case, it may enjoin the parties from proceeding in a State Court of concurrent jurisdiction, where the effect of the action would be to defeat or impair the jurisdiction of the federal court."

Kline v. *Burke Construction Co.*, 260 U.S. 226, 229.

"The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of Section 265 of the Judicial Code. (Citing many cases). These principles apply to proceedings in bankruptcy. (Citing many cases)."

Local Loan Co. v. *Hunt*, 292 U.S. 234, 239,240.

VIII

THE BANKRUPTCY COURT HAS THE POWER TO PROCEED SUMMARILY BY ANCILLARY PETITION IN ALL MATTERS AS TO WHICH IT HAS JURISDICTION AND NEED NOT PROCEED BY FORMAL PLENARY PROCEEDINGS.

In the Rock Island case the Court held that the injunction may be granted in a summary proceeding.

Continental Bank v. *Rock Island Ry.*, 294 U.S. 648, 681, 682.

See also:

Local Loan Company v. *Hunt*, 292 U.S. 234, 239, 240.

Murphy v. *John Hofman Co.*, 211 U.S. 562, 569.

Wabash Railroad v. *Adelbert College*, 208 U.S. 38.

1 High on Injunctions, Section 302.

5 Remington on Bankruptcy, Sections 2193.50, 2517.

IX

THE FUNCTION OF THE COMMISSION AND THE BANKRUPTCY COURT WORK COOPERATIVELY IN REORGANIZATION.

Palmer v. *Massachusetts*, 308 U.S. 79, 87.

Warren v. *Palmer*, 310 U.S. 132, 137, 138.

Smith v. *Hoboken R.R.*, 328 U.S. 123, 132.

X

THE COMMISSION HAS EXCLUSIVE AND PLENARY POWER OVER THE SUBJECT OF THE MERGER, OR CONSOLIDATION OF RAILROADS OR THE PURCHASE OF ONE RAILROAD BY ANOTHER.

Section 5 of the Interstate Commerce Act confers power on the Interstate Commerce Commission in the matter of the consolidation or merger of rail carriers and the purchase of the property of one rail carrier by another rail carrier, and Section 5 (2) prescribes the procedure therefor. Under Section 5 (4) it is unlawful for any person to enter into any such transaction without the authority of the Commission. Section 5 (11) provides "The authority conferred by this Section shall be *exclusive and plenary*", and that any corporation participating in such transaction shall have full power to carry such transaction into effect "with the assent *** of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation, *** *without invoking any approval under State authority*" and that any corporation or their officers or employees participating in such transaction "*shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations and prohibitions of law, Federal, State or municipal as may be necessary to enable them to carry into effect the transaction so approved* *** any power granted by this Section to any carrier or other corporation *shall be deemed to be in addition to and in modification of its powers under its corporate Charter or under the laws of any State*". (Italics ours).

This Court has held with respect to the above provision which relieves carriers from the operation of "the anti-trust laws and all other restraints, limitations and prohibitions of law, Federal, State or Municipal", that the scope of this immunity is not limited to laws of the same genus as anti-trust legislation.

New York Central Securities Co. v. *U. S.*, 287 U.S. 12, 26.

Texas v. *U.S.*, 292 U.S. 522, 534.

The phrase in Section 5 (11) above, "unless a different vote is required by State law", should not be stretched so as to include a law which required a unanimous vote. Such a construction would render the Statute unworkable. The phrase naturally means more or less than a majority. We have never heard of a law which required a unanimous stockholder vote for corporate action. The contention in the Benton suit is that a conveyance by South Western is ultra vires. The State Court Judge held that the conveyance could not be made except by unanimous consent of stockholders.

The phrase "applicable State law" means Statute law.

The Court of Appeals in its majority opinion stated "There is nothing in the plan to indicate that an ultra vires acceptance is authorized or required or that any State law which prohibits acceptance should be disregarded. The plan does not provide that the leased lines may be acquired by a simple majority vote of the stockholders of the Company". Naturally, the plan does not contain any statements of this kind. The Federal Stat-

utes which we have quoted above explicity provide for acquisition on a majority vote unless a different vote is required under State law, and relieves the carrier from any restraints, limitations and prohibitions of State law.

XI

SECTIONS 94-328, 94-329 AND 94-311, 94-318 CONFER POWER ON SOUTH WESTERN TO CONVEY ITS PROPERTIES BY A MAJORITY VOTE OF STOCK.

These Code Sections are copied in Appendix No. 2. They are not amendments of the Charter of South Western. They are general laws which are applicable to South Western; none of them mention South Western by name.

Code Sections 94-328 and 94-329 are codifications of an Act passed March 10, 1933. The Legislature evidently had in mind South Western and other leased lines of Central because the properties of Central, including its leased lines went into the hands of receivers December 19, 1932, (R. 61), and this law was intended to help them in the exigencies which then confronted them.

South Western fills all of the conditions of Code Section 94-928. It was a railroad organized under the laws of Georgia. Its property had been leased for a long term of years to another corporation. The lease under the provisions of the plan is terminated if the plan is not accepted by South Western, and it becomes likewise terminated if South Western accepts the plan and conveys its property. It is not a going concern.

(In a litigation between South Western and the United States in the Middle District of Georgia (R. 129-133) it was decided that South Western was not carrying on or doing business and was therefore not liable for the Federal Capital Stock Tax). South Western is not equipped to conduct the operations of a railroad company.

The State of Georgia by this Statute (as well as by Code Sections 94-311 and 94-318) has consented to the sale or consolidation or merger of South Western. The sale is not ultra vires so far as the State of Georgia is concerned.

Respondents contend that these Code Sections violate the obligations of the contract between the corporation and its stockholders, or between the stockholders themselves. The Charter of South Western is simply silent on this subject of sale of the railroad. No contract can possibly be spelled out from the Charter that the railroad could never under any conditions be sold. The Charter is perpetual. The exigencies pointed out by Code Section 94-328 have arisen. The great weight of modern authority (as we have pointed out in a subsequent section of this brief) is to the effect that a corporation in the situation of South Western can sell its property on the vote of a majority of its stock. The State having granted its consent, the corporation although a quasi-public corporation, is on the same plane as to sale of its property as a private corporation.

As we have said, these Statutes do not purport to be and are not amendments of South Western's Char-

ter. Section 94-328 rescues South Western and its stockholders from a difficult position; it does not in a constitutional sense violate the obligations of the Charter. It cannot be regarded as a fundamental radical or vital change in the Charter, such as the minority stockholders would have the right to enjoin, because it does not impair their vested rights. It would be most unfortunate for the stockholders if they could never sell or lease their property without unanimous consent, because it would be practically impossible to secure such consent.

Code Sections 94-311 and 94-318 are codified from the General Railroad Law of Georgia passed in 1892, under which Central of Georgia Railway Company was incorporated (R. 61).

Power given to one corporation to consolidate with another, or to purchase the property of another, necessarily confers power on both corporations.

Theis v. *Spokane Falls Gas Light Co.*, 49 Wash. 477, (95 Pac. 1074, 1079, 1080).

Under the general railroad law of Georgia, proper corporate action for the purposes of sale, merger or consolidation, is a majority vote of the stock of the corporation.

Dady v. *Georgia & Alabama R. Co.*, 112 Fed. 838.

The transfer of the property of South Western will be carried out under an order of the Interstate Commerce Commission in pursuance of the powers conferred on it by the Interstate Commerce Act and Section 77 of the Bankruptcy Act, and it would make no

difference whether the Code Sections quoted above were unconstitutional, because in that event there would be no statute law in Georgia on the subject of what vote should be required, and even if the Constitution and laws of Georgia should prohibit the sale of South Western property, the Commission could and would set them aside as it has the undoubted right to do.

XII

THE INTERSTATE COMMERCE COMMISSION HAVING EXCLUSIVE AND PLENARY JURISDICTION UNDER SECTION 5 OF THE INTERSTATE COMMERCE ACT OF THE ACQUISITION OF SOUTH WESTERN, THE REORGANIZATION COURT CLEARLY HAD POWER TO ENJOIN THE PROCEEDINGS IN THE BENTON CASE IN THE STATE COURT.

The Commission in its plan of reorganization has made provision for the acquisition of South Western by the reorganized Company. As we have pointed out heretofore, sub-section (f) of Section 77 of the Bankruptcy Act provides that upon confirmation of the plan the Commission shall grant authority for the transfer of any property, consolidation or merger of the debtor's property to the extent contemplated by the plan. The last provision of the plan paraphrases this provision of sub-section (f) of Section 77. The Commission and the Court work cooperatively toward reorganization. The Benton case in the State Court, ignoring the exclusive and plenary jurisdiction of the Interstate Commerce Commission and of the Bankruptcy Court, undertakes to decide for itself that the reorganized Company cannot acquire the South Western under the plan. This is clearly an unwarranted assumption of jurisdiction by the State Court in a matter which is wholly outside of and beyond its jurisdiction.

The two following cases lately decided by this Court are decisive of this question. They were not referred to or cited by the majority opinion of the Court of Appeals. They were simply ignored although they were vigorously pressed on the attention of the Court.

A railroad lease contained a forfeiture clause and the Lessor elected to forfeit the lease. The District Court of the United States in which the Lessee was being reorganized, granted the motion of the Lessor to terminate the lease. The Supreme Court held that the Bankruptcy Court should have awaited the action of the Interstate Commerce Commission on this subject, because under the provisions of Section 77 of the Bankruptcy Act, the Commission had the prior right to determine whether in the interest of reorganization the leased line should continue to be operated by the Lessee or should revert to the system of the Lessor. The Court held that the point was that if the reorganization Court decrees a forfeiture in advance of consideration of the question by the Commission, it interferes with the functions entrusted to the Commission by Section 77. The Court therefore decided that the District Court should stay its hand pending a decision by the Commission on the question.

Smith, Trustee, v. *Hoboken R. Co.* 328 U.S. 123.

The Brownsville Railroad was operating certain tracks owned by the Texas Mexican Railway Company under a trackage agreement. The Texas Railway gave notice of the termination of the agreement as it had the right to do under the terms of the agreement. The Brownsville Company was in Bankruptcy under Section 77. The Texas Company brought suit in a State Court to enjoin the Brownsville Company

from using the tracks and to recover damages for their use. The State Court tried the case on its merits and awarded damages to the Texas Company. The State Court denied the injunction. The Supreme Court first held that in so far as the suit involved a money claim, that the State Court has jurisdiction under Section 66 of the Judicial Code. The Supreme Court then held (p. 142) "Prior to the rendition of the judgment on the merits, the decision of the Interstate Commerce Commission was necessary on two phases of the controversy — one under Section 77 of the Bankruptcy Act, the other under the provisions of the Interstate Commerce Act *** The Commission has the primary responsibility for formulating plans of reorganization under Section 77". The Supreme Court then pointed out that the problem was akin to that involved in the Rock Island case (294 U.S. 648). The Supreme Court also pointed out that the Commission had further powers of an exclusive nature under Section 1 (18) of the Interstate Commerce Act which relates to abandonments. The judgment of the State Court was stayed pending the conclusion of appropriate administrative proceedings.

Thompson, Trustee, v. *Texas Mexican Ry. Co.*, 328 U.S. 134.

XIII

EVEN IF THERE IS ANY STATE LAW WHICH INTERFERES WITH THE ACQUISITION OF SOUTH WESTERN, THE INTERSTATE COMMERCE COMMISSION CAN SET IT ASIDE IN THE PUBLIC INTEREST.

The power of the Commission in this respect has frequently been asserted by the Commission and sustained by the Courts.

This case was decided by the Supreme Court February 16, 1948, shortly before certiorari was granted in the case at bar. Under the Constitution and laws of the State of South Carolina, a railroad can be owned and operated only by corporations created by that State. Seaboard Air Line Railway Company was reorganized in a Court of Equity. The Interstate Commerce Commission authorized, in the public interest, that the reorganized Seaboard Company (which was not created under the laws of South Carolina) might acquire and operate a railroad in South Carolina. The order of the Commission was upheld by the Supreme Court on the theory that the Commission had exclusive and plenary power over the acquisition and having decided that the acquisition was in the public interest, the Constitution and laws of South Carolina could be set aside.

Seaboard Air Line R.R. Co., v. *Daniel*, 333 U.S. 118.

To the same effect see:

Schwabacher v. *U. S. et al.*, 334 U.S. 182.

In re Chicago, R. I. & P. R. Co., 168 F (2d) 587.

The question in this case involved the power of the Commission to require a railroad to make switch connections with a private sidetrack built by a shipper. Under Section 1, paragraph 22, of the Interstate Commerce Act the Commission has jurisdiction over the abandonment or construction of switching or sidetracks. The Supreme Court held "Neither the Legislature nor the Courts of a State can limit the power of the Interstate Commerce Commission to compel connections with private sidetracks".

Cleveland, C.C. & St. L. Ry. Co. v. *United States*, 275 U.S. 404.

This case involved the lease by the New York Central of the Big Four and Michigan Central Companies, which were competitors of the New York Central. The laws of the States of incorporation of these railroads against leasing competing lines, and especially the laws of Ohio, were invoked. The Commission nevertheless authorized the leases. The Supreme Court upheld the power of the Commission and refused to set aside the order of the Commission.

New York Central Securities Co. v. *United States*, 287 U.S. 12, 26, 27.

"The Interstate Commerce Commission has power to authorize a lease of one interstate railway to another permitting the lessee to abandon or remove general offices and shops of the lessor, the maintenance of which as found by the Commission would entail unnecessary and wasteful expenditures, even though such abandonment or removal be forbidden by law of the State of the Lessor's incorporation in which such offices and shops are located" (h.n. 4). On page 531 the Court says "Even explicit charter provisions must yield to the paramount regulatory power of Congress. New York v. United States, 257 U.S. 591, 601."

Texas, et al. v. *United States*, 292 U.S. 522.

The reorganization plan of the Missouri Pacific Railway Company provided for the consolidation of a subsidiary Texas Railroad Company with the reorganized Company and removed the restriction in the Texas laws requiring a Texas railroad company to keep its head office in Texas, and the plan further provided that the head office of the reorganized consolidation should be in St. Louis, Mo. The District Court on the au-

thority of Texas v. United States, 292 U.S. 522, approved the reorganization plan and said (p. 448) "Inconsistent State laws must give way to consolidations effected under authority of the commerce or bankruptcy powers of the Federal Constitution".

In re *Missouri Pacific R. Co.*, 39 F. Supp. 436.

This case involved the question whether the New Haven Railroad Company should apply to the Public Service Commission of Massachusetts for authority to discontinue some 88 passenger stations. This question had nothing to do with the final reorganization. The Supreme Court decided that the Trustee in Bankruptcy was not relieved by Section 77 from making application to the Public Service Commission. The particular part of the decision to which we desire to call attention is the statement on page 88 that the Bankruptcy Court could disregard State law "as part of a complete reorganization for an insolvent road".

Palmer, Trustee, v. *Massachusetts*, 308 U.S. 79.

"State statutes permitting street railways to sell or lease property and franchises to traction companies and permitting operation, as a general system, of different lines which are thus owned, leased or controlled or operated, could not forbid or delimit the jurisdiction of a federal bankruptcy court."

In re *Pittsburgh Railways Company*, 155 F. (2d) 477.

In proceedings in Bankruptcy The New Haven was authorized to purchase the Old Colony, which was leased to New Haven and was authorized to discontinue passenger service on certain portions of Old Colony

if the losses therefrom exceeded certain specified figures during a given period of time. The Commonwealth of Massachusetts objected to this provision as to discontinuing passenger service on the ground that such service could not be discontinued without its authority. The Court held that the provisions of sub-section (f) of Section 77 gave the Bankruptcy Court this power "the laws of any State or the decision or order of any State authority to the contrary notwithstanding" and followed the decision in Palmer, Trustee, v. Massachusetts, 308 U.S. 79. This case also relates to the use by the New Haven of the Boston Terminal Company's property at a reduced rental. The contention was that under the Massachusetts Statute there was a statutory obligation on New Haven and the other users of the terminal to use the terminal and to pay the stipulated rental. As to the Boston Terminal the Court said (pages 51 and 52): "This presents a problem similar to that discussed in the appeal of Massachusetts (referring to the Old Colony matter). For reasons there stated we believe that the Commission can adopt a plan which abrogates State laws that it finds inimical to the public interest in their impingement upon an interstate railroad in reorganization."

In re *New York, N.H. & H.R. Co.*, 147 F. (2d) 40.

In connection with the Boston Terminal case the Court in the above cited case stated "The plan could not and does not amend the charter of the Terminal Company". In making this statement the Court had evidently overlooked the provision in Section 5 (11) of the Interstate Commerce Act which provides "Any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and

in modification of its powers under its corporate charter or under the laws of any State". And the Court also evidently overlooked the provision in the same section of the Interstate Commerce Act which relieves carriers in a matter of this kind from "restraints, limitations and prohibitions of law, Federal, State or Municipal, so far as may be necessary". It was not necessary for the Court or anyone else to amend the Charter of the Boston Terminal Company; the law itself had the effect of amending the Charter, to carry out the provision which the Commission decided was in the public interest, although it might be contrary to the Charter.

The Interstate Commerce Commission has in three late decisions set aside restraints, limitations and prohibitions of State laws.

Pere Marquette Ry. Co. Merger, 267 I.C.C. Rep. 207 246, 247, 248.

Wheeling & Lake Erie Ry. Co. Control, 267 I.C.C. Rep. 401, 415, 416.

Southern Pacific Reincorporation, 267 I.C.C. Rep. 523, 545.

The Court of Appeals in its majority opinion states "For the Bankruptcy Court to hold that a majority vote of the stockholders of South Western would be sufficient, regardless of State law, would amount to amending the plan in the face of the statute which provides that no plan shall be approved or confirmed by the Judge 'unless the plan has been approved by the Commission and certified to the Court' ". The plan was approved by the Commission and certified to the Court

and was approved by it June 24, 1946, before the Benton case was filed. Moreover, the decision of the Bankruptcy Court is misquoted. The Bankruptcy Court merely decided that under the provisions of the Interstate Commerce Act all that was necessary was a majority vote, that the State Statutes required only a majority vote, but even if the State laws required a unanimous vote the Commission under its powers conferred by the Interstate Commerce Act could disregard any such State law and that under the provision of sub-section (f) of Section 77 of the Bankruptcy Act in carrying the plan into effect the Court could disregard any State law or decision contrary to the plan.

XIV

THE PROVISIONS OF THE INTERSTATE COMMERCE ACT AND OF SECTION 77 OF THE BANKRUPTCY ACT ON WHICH WE RELY ARE NOT INVALID IF THEY OPERATE COLLATERALLY TO IMPAIR OR DESTROY THE OBLIGATIONS OF CONTRACTS.

Respondents contend that the Georgia Code Sections to which we have referred are unconstitutional in that they impair the obligation of the contract between the South Western and its stockholders and the stockholders themselves. But the acquisition of South Western will be effected under Section 5 of the Interstate Commerce Act, irrespective of what may be the law of Georgia. The Contract Clause of the Federal Constitution only relates to State action.

"Congress *** undeniably has authority to pass legislation pertinent to any of the powers conferred by the Constitution, however it may operate collaterally or

incidentally to impair or destroy the obligation of private contracts."

Continental Bank v. *Rock Island Ry. Co.*,
294 U.S. 648, 680.

"The equitable distribution of the bankrupt's assets, or the equitable adjustment of creditors' claims in respect of those assets, by way of reorganization, may therefore be regulated by a bankruptcy law which impairs the obligation of the debtor's contracts. Indeed every bankruptcy law impairs the obligation of the debtor's contracts."

Kuehner v. *Irving Trust Co.*, 299 U.S. 445, 452.

See also:

Hanover National Bank v. *Moyses*,
186 U.S. 181, 188.

New York v. *United States*,
257 U.S. 591, 592, 600, 601.

In re *New York, N.H. & H.R. Co.*,
54 Fed. Supp. 595, 623, 624.

XV

THE STATE COURT HAVING ACTED IN EXCESS OF ITS JURISDICTION, ITS JUDGMENT IS VOID AND THE BANKRUPTCY COURT HAD POWER TO ANNUL THE INTERLOCUTORY INJUNCTION GRANTED BY THE STATE COURT.

Ordinarily, the State Court had jurisdiction of the parties and of the question as to what were the powers of South Western under its Charter but in this case

and under these circumstances, it clearly acted in excess of its powers and beyond its jurisdiction, and, therefore, the Bankruptcy Court had power to declare null and void the interlocutory injunction granted by the State Court Judge of his own motion,

United States v. *Walker*, 109 U.S. 258.
(reviewing many cases on the subject).

Simpson v. *Amarillo Mut. Benevolent Assn.*,
68 S.W. (2d) 397.

Duncan v. *National Union Fire Ins. Co.*,
4 S.W. (2d) 278.

In re *Long Island Properties, Inc.*, 42 F. Supp. 323.

XVI

THE ACQUISITION OF SOUTH WESTERN UNDER THE REORGANIZATION PLAN IS A FEDERAL QUESTION AND NOT A QUESTION OF STATE LAW.

The acquisition of South Western is controlled by Section 5 of the Interstate Commerce Act and Section 77 of the Bankruptcy Act. Even if the State law prohibited the acquisition of South Western by the reorganized company, the question whether it could be so acquired would be a Federal question which arises under the Interstate Commerce Act and Section 77 of the Bankruptcy Act. The majority opinion of the Court of Appeals stated the question "was peculiarly a question of State law". But it is obviously a Federal question.

The following case concerned the merger of the Pere Marquette Railroad Company and the Chesa-

peake and Ohio Railroad Company under Section 5 of the Interstate Commerce Act. The Court holds that the merger was governed by the Federal Act and not by the State law.

Schwabacher v. *U. S., et al.*, 334 U. S. 182.

See also
In re Chicago C. & O. Ry. Co., 108 F. (2d) 587.

Under the State law of Texas, the execution of an oil and gas lease is deemed to pass immediately to the lessee the title to the oil and gas. The income received by the lessor from a Texas gas lease, was taxed not as gain from a capital asset but as ordinary income. The Court held that whether the income received by the lessor was a capital asset or income was a matter of Federal law. The Court said (p. 110):

> "The state law creates legal interests but the federal statute determines when and how they shall be taxed."

Burnet v. *Harmel*, 287 U.S. 103.

Under the law of Wisconsin a certain power of appointment would be held to be a special power. Under the Federal Income Tax Law, "a general power of appointment" is taxable. The Court held that it was entitled to put its own interpretation upon the power of appointment and held that the power was general within the intent of the Revenue Act, notwithstanding it might be classified as special by the law of Wisconsin.

Morgan, Extr. v. *Commissioner*, 309 U.S. 78.

The director of a national bank gave his note to the bank with the understanding it was not to be paid. A receiver of the bank brought a suit against the

director to compel payment of the note. The Court held that the liability of the director was not a matter of State law, but that "judicial determination of the legal consequences of acts condemned by the National Bank Act involves decision of a Federal question".

Deitrick, Receiver, v. *Greaney*, 309 U.S. 190.

to the same effect:

D'Oench Duhme & Co. v. *F.D.I.C.*, 315 U.S. 447.

Under the Federal Revenue Laws, gifts of "future interest" are taxable. The insistence was that under the statutes and judicial decisions of Alabama, where the trust was created and was being administered, that this particular gift was not a gift of "future interest". The Court held (p. 402):

> "But as we have often had occasion to point out, the revenue laws are to be construed in the light of their general purpose to establish a nation-wide scheme of taxation uniform in its application. Hence their provisions are not to be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law".

United States v. *Pelzer*, 312 U.S. 399, 402, 403.

Under the decisions of the New York Court of Appeals one who guarantees payment of certificates representing undivided interest in a mortgage, which are sold to investors, thereby impliedly agrees that any claim of his own in the mortgage indebtedness shall be subordinate to those of other certificate holders. The

Court held that although this might be the rule governing rights of claimants in a State liquidation, it was inapplicable to a Federal bankruptcy proceeding because the Bankruptcy Court liquidated insolvent estates in accordance with its own rules.

Prudence Realization Corp. v. *Geist, Trustee*, 316 U.S. 89.

The question in this case was whether a farmer-debtor in Alabama had the right under Section 75 of the Bankruptcy Act to redeem his property which had been sold out under foreclosure. His contention was that under the Alabama Statutes the right of redemption was an individual privilege, was not a property right and therefore did not pass under the Bankruptcy Act. The Court held (p. 328):

> "In the interpretation and application of the Bankruptcy Act as in the case of other federal statutes, federal not local law applies. Prudence Corp. v. Geist, 316 U.S. 89, 95, and cases cited. It is for the bankruptcy court to determine, by reference to the provisions of the bankruptcy Statute, what rights created by state law — regardless of the characterization which may be applied to them by state statutes and decisions — are within the jurisdiction of the bankruptcy Court."

Wragg v. *Federal Land Bank*, 317 U.S. 325.

XVII

THERE IS EVERY REASON WHY THE QUESTION OF THE ACQUISITION OF SOUTH WESTERN SHOULD NOT BE REFERRED TO THE STATE COURT FOR ITS DECISION.

The question is fundamentally a question of Federal law.

A Bankruptcy Court is not at liberty to surrender its exclusive jurisdiction, particularly in a case like this.

Isaac v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 739.

U.S. Fidelity Co. v. *Bray*, 225 U.S. 205, 218.

In re *New York, N.H. & H.R. Co.*, 54 F. Supp. 595, 624.

Markham, Alien Property Custodian, v. *Allen*, 326 U.S. 490, 495.

But even if the question was one of State law the Bankruptcy Court would have the power and it would be its duty to decide the question, because the Bankruptcy Court and the Commission have exclusive jurisdiction of the subject matter and the Bankruptcy Court has the property in its possession.

Meredith v. *Winter Haven*, 320 U.S. 228.

Williams v. *Green Bay & W.R. Co.*, 326 U.S. 549.

The principle of "forum non conveniens" has no application here and for that reason the two following cases relied on by Respondents are inapplicable.

Thompson, Trustee, v. *Magnolia Petroleum Co.*, 309 U.S. 478.

In re *Central R.R. of New Jersey*, 163 F. (2d) 44.

XVIII

THE OBSERVATION IN THE MAJORITY OPINION OF THE COURT OF APPEALS THAT A SOLVENT CORPORATION CANNOT BE CONSTITUTIONALLY COMPELLED AGAINST ITS WILL TO CONVEY TO THE DEBTOR IS WHOLLY IRRELEVANT.

No one is seeking to compel South Western to convey its property against its wishes. It was entirely

free to reject the offer made to it in the Plan. It has accepted the offer and its acceptance has been assented to by a large majority of its stock. A small minority of stockholders is trying to thwart the wishes of the majority, on the impossible theory that South Western cannot convey its property except by unanimous stockholder consent.

XIX

THE BANKRUPTCY COURT IS NOT BOUND TO FOLLOW THE DECISION OF JUDGE ATKINSON OF THE STATE COURT IN GRANTING THE INTERLOCUTORY INJUNCTION IN THE BENTON CASE.

Respondents contend that the question is one of State law and that the Federal Court is bound to follow the State law as interpreted by the State Court and they particularly rely on Fidelity Union Trust Co. v. Field, 311 U.S. 169, which states the proposition that in the absence of a decision by the highest Court of the State, the Federal Court in deciding a question of State Law, should follow the decision of an intermediate State Court, in the absence of more convincing evidence of what the State law is.

This Court has recently modified the decision in Fidelity Union Trust Co. v. Field and held that a Federal Court in applying local law in a diversity case, is not bound to follow a decision of a court of first-instance which is the only State decision on the subject, where the existence of such a decision can be determined only by examination of Court records and it is not regarded by the State Courts as a binding precedent.

Mary Bell King v. *Order of United Commercial Travellers of America*, 333 U.S. 153.

The circumstances under which Judge Atkinson's decision was rendered do not lend any weight to it. It is purely interlocutory. There is no other decision in the State of Georgia which supports his decision. The facts as to the exigencies which confront South Western were not pleaded, nor in evidence in the Benton case.

XX

IN THE EXIGENCIES WHICH CONFRONT SOUTH WESTERN IT CLEARLY HAS POWER TO SELL ITS PROPERTY TO THE REORGANIZED COMPANY ON THE VOTE OF A MAJORITY OF ITS STOCK, AND THE BANKRUPTCY COURT HAD THE POWER TO DECIDE THE QUESTION IN THE PROCEEDING BEFORE IT.

The Bankruptcy Court had all the parties before it necessary to a decision of the question. The minority stockholders who had raised the question were in Court. If the question is decided against the contention of Benton, et al., there is nothing in their case. The Bankruptcy Court had exclusive jurisdiction of the property and the reorganized proceeding. There is no valid reason why the Bankruptcy Court should not decide the question when its decision was invoked by the Trustee who brought the proceeding. The question cannot be lawfully decided anywhere but in the Bankruptcy Court. The Bankruptcy Court was not compelled to decide the question, because it could sustain the injunction against the Benton proceeding in the State Court on other grounds, but as its decision was invoked and it did decide the question correctly, the Court of Appeals should have affirmed the judgment.

(1) By virtue of Sections 94-328, 94-329, 94-311, and 94-318, of the Code of Georgia which we have

hereinbefore cited, the State of Georgia has consented to the sale, consolidation or merger; so that South Western stands just in the same position as to sale of its property as does any private corporation.

(2) We have set forth in the Statement of Facts in the brief the exigencies which confront South Western which make it necessary and desirable for it to liquidate its property. There is no dispute as to these facts.

(3) There is no decision in Georgia to the effect that a corporation can never under any circumstances sell its property without unanimous consent. The specific question as to whether a corporation can sell its property by a majority vote of its stockholders when it is insolvent or liable to become so, or where the exigencies of the situation make it expedient to sell its property, has never come before the Courts of the State of Georgia.

The nearest form in which a question of this kind came before the Supreme Court of Georgia is the case of *Plant* v. *Macon Oil & Ice Co.*, 103 Ga. 666. In that case the question was whether or not the Defendant should be permitted to make a short term lease of its property without the unanimous consent of its stockholders. The Court held that under the particular circumstances of that case, that such a lease could be made. After reviewing all the authorities, the Court summed up its investigation of the subject as follows:

> "Upon a cursory glance at the authorities above cited, and a number of others we have investigated upon the subject, there would seem

at first to be an irreconcilable conflict upon the powers and rights of a majority and a minority of stockholders in a private corporation, touching its authority to alienate or lease its property and franchises. But we think that nearly if not quite all of the authorities upon the subject can be reconciled, and that from a careful consideration of all of them together can be deduced the following principles, about which there seems to be very little, if any, conflict: 1st. While a public or quasi-public corporation can not, without express authority, convey or lease its property and privileges as a general rule this can be done by a private corporation. 2nd. But a private corporation, limited as to duration, while doing a successful business, can not sell out and abandon its enterprise, over the protest of a minority of its stockholders, who have the right to insist upon a continuance of its business. 3rd. While a minority of stockholders have the right recognized in the paragraph just above, it can not compel a majority to continue indefinitely in the business of the corporation, provided a majority, in arrangements to discontinue the business, fully protect the interests of the minority by payment in full of the value of their shares, should it be demanded. 4th. A minority of stockholders can not compel a corporation, against the wishes of a majority of the owners of the stock therein, to continue a business that would be unprofitable or ruinous in its results to the interests of all concerned; hence it has been often held that an insolvent corporation has the right to make an assignment for the benefit of creditors, which right does not depend upon the assent of all its stockholders."

(4) There are many cases decided by the Supreme Court of Georgia to the effect that when a proposed

amendment to a charter of a corporation is fundamental, radical, or vital, unanimous consent of the stockholders to the acceptance is essential.

To illustrate:

The charter of a railroad company could not be amended so as to adopt all of the provisions of the Act of 1892 relating to the incorporation of railroads, without unanimous consent.

Alexander v. *A. & W.P.R. Co.*, 108 Ga. 151.

A stockholder would be released from a subscription to capital stock if the stock was increased, the route of railroad changed, its name changed, and various extensions made by amendment to its charter.

Snook v. *Ga. Improvement Co.*, 83 Ga. 61.

The capital stock of the corporation could not be increased by amendment without unanimous consent of stockholders.

Atlanta Steel Co. v. *Mynahan*, 138 Ga. 668.

Macon Gas Co. v. *Richter*, 143 Ga. 397.

See also:

Johnson v. *Tribune Herald Co.*, 155 Ga. 204.

(5) There is no prohibition in the charter of the South Western against the sale of its property. This does not mean that the stockholders of the South Western had impliedly contracted with each other that the property could never be sold under any conditions. The

charter is a perpetual one, and it is not to be presumed that the stockholders contracted with each other to forever operate the railroad under any and all conditions, and that they could never under any conditions sell the property.

The great weight of modern authority is to the effect that under the exigencies in which the South Western Railroad finds itself, that it can sell its property on the vote of a majority of its stockholders.

The modern doctrine is thus summed up in Fletcher Cyc. Corporations, Section 5797:

> "The general rule is that a solvent corporation, where not a quasi-public corporation, may transfer all of its property *** The question now for consideration is whether a majority of the stockholders may authorize such a sale as against the dissent of one or more minority stockholders. *** If there is no governing statute or charter provision, the decisions generally classify themselves according to whether (1) the transfer is required by the exigencies of the business, or (2) the transfer is not required by such exigencies. In the first instance, a private corporation, as distinguished from a quasi-public corporation, may transfer all of its property when the exigencies of the business require it to do so, as where it is insolvent or in failing condition, or when the circumstances are such that it can no longer profitably continue its business, even though minority stockholders object thereto, and the power may be exercised by a bare majority of the stockholders, *** And while the rule is generally applied in cases where the corporation is insolvent, and some decisions apparently limit the rule to cases where the corporation is insol-

vent, some decisions do not require actual or technical insolvency. *** On the other hand, it is generally held that where the transfer is not required by the exigencies of the business, as where the corporation is a prosperous and going concern, the transfer cannot be made against the dissent of minority stockholders *** But while the weight of authority denies to the majority stockholders the power to sell all the corporate property, where the corporation is solvent and prosperous, there are decisions authorizing such a sale in any case where the majority deem it expedient so to do, and the trend of the later decisions seems to be in favor of permitting such a sale by the majority, against the dissent of minority stockholders, whenever deemed expedient."

See also: *Fletcher Cyclopedia Corporations*, Sections 2946 and 2947.

The text of Fletcher Cyclopedia Corporations is sustained by all of the text-writers.

See: *Morawetz on Private Corporations* (2 ed.) Section 413.

Noyes (2 ed.) *Intercorporate Relations*, Sections 110 and 111.

Professor Warren in 30 Harvard Law Review 335, at page 358, states his view as follows:

"It is submitted that the holders of a majority of the stock of a corporation organized for profit have the power to cause a transfer of all the corporate assets and a distribution of the proceeds (after satisfying creditors) to the stockholders whenever, for legitimate business reasons, they deem such a course wise. Financial

embarrassment is not the only legitimate business reason for such a transfer. If such a corporation is engaged in a public employment, the consent of the State to the transfer becomes necessary; but this is simply an additional requirement, and in no wise effects the relation of the majority of the stockholders toward the minority."

The Supreme Court of the United States set forth the doctrine thus in *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 595, 597, 598:

"It is, of course, a general rule of law that, in the absence of special authority so to do, the owners of a majority of the stock of a corporation have not the power to authorize the directors to sell all of the property of the company and thereby abandon the enterprise for which it was organized. But to this rule there is an exception, as well established as the rule itself, viz: that when, from any cause, the business of a corporation, not charged with duties to the public, has proved so unprofitable that there is no reasonable prospect of conducting the business in the future without loss, or when the corporation has not, and cannot obtain, the money necessary to pay its debts and to continue the business for which it was organized, even though it may not be insolvent in the commercial sense, the owners of a majority of the capital stock, in their judgment and discretion exercised in good faith, may authorize the sale of all of the property of the company for an adequate consideration, and distribute among the stockholders what remains of the proceeds after the payment of its debts, even over the objection of the owners of the minority of such stock (citing text-books). The rule that owners of a majority of the stock may not authorize the sale of all of the property of a going

and not unprofitable company, rests upon the principle that exercise of such power would defeat the implied contract among the stockholders to pursue the purpose for which it was chartered. But this principle fails of application when a business, unsuccessful from whatever cause, is suspended without prospect of revival, and the law recognizes that under such conditions the majority stockholders have rights as well as the minority and that it should not require the former to remain powerless until the creeping paralysis of inactivity shall have destroyed the investment of both."

The following case cites many authorities and refers to many text writers to sustain the proposition for which we contend.

Paterson v. *Shattuck Arizona Copper Co.*,
168 Minn. 611; 244 N.W. 281.

Among the many cases to sustain this proposition we cite:

Calnan v. *Guaranty Security Corp.*,
271 Mass. 531; 171 N.E. 830.

Beidenkopf v. *Des Moines Life Ins. Co.*,
160 Iowa 629; 142 N.W. 434.

Inhabitants of Waldoborough v. *Knox. & L.R. Co.*,
84 Me. 469; 24 Atl. 942

Bassett v. *City Bk. & Tr. Co.*, 116 Conn. 617;
165 Atl. 357.

(66) The case of Alexander v. Atlanta & West Point R.R. Co., 108 Ga. 151, (which is relied on by Respondent) merely holds that this Railroad Company could not amend its charter which was a special charter granted by the Legislature by adopting the provisions of the subsequent General Law for the incorporation of

railroads without the unanimous consent of its stockholders, because this was a fundamental and radical change of its charter. The Court did not decide the question whether it was necessary to get unanimous stockholder consent to amend its charter to authorize it to build a belt line railroad (see the last paragraph of the decision). The case did not involve the power to sell in case of insolvency or other exigencies which might make a sale necessary.

The case of City of Knoxville v. Knoxville & Ohio R. Co., 22 Fed. 758 (which is also relied on by Respondents), differs from the case at bar, in that the East Tennessee Railroad Company with which it was proposed to consolidate the Knoxville Railroad owned a majority of the stock of the latter and it was proposed to pay the stockholders of the Knoxville Railroad Company with stock in the East Tennessee Company. The case was decided 63 years ago and even under the facts of the case, is not in harmony with modern authority.

XXI

NOTWITHSTANDING CONSUMMATION OF THE PLAN SINCE THE CERTIORARI WAS GRANTED, THE REORGANIZATION PROCEEDINGS HAVE BEEN KEPT OPEN AS TO SOUTH WESTERN AND AS TO THIS LITIGATION.

The Plan of Reorganization of the Central contemplated that the leased lines should be acquired prior to or upon the consummation of the Plan. It was ob-

vious that the South Western could not be acquired prior to or upon the consummation of the Plan on account of this litigation, and, therefore, the United States District Court passed an order dated March 5, 1948, providing for the acquisition of the South Western properties under the Reorganization Plan within a reasonable time after the termination of this litigation. Under this order the lease of South Western is cancelled as of the consummation date, and if the properties should be acquired under the Plan, the securities allotted under the Plan would be delivered and would draw interest from the consummation date and, in the meantime, the leased line will be operated by the reorganized Company.

The Plan was consummated, except as to the South Western, as of July 1, 1948, by an order of the United States District Court passed June 24, 1948, and the Trustee of the Debtor was authorized by said order to continue this litigation.

The United States District Court also on May 18, 1948, passed an order approving the determination of the Reorganization Managers that the method of acquisition of the leased lines should be by purchase.

The result of all this is that the status quo of the South Western with reference to the Reorganization Plan, is the same now as it was at the time the certiorari was granted in this case.

Certified extracts from the orders of the Court re-
red to above are set forth in Appendix No. 3.

Respectfully submitted,

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APPENDIX No. 1

APPLICABLE SECTIONS OF THE INTERSTATE COMMERCE ACT. (Italics ours).

Section 1, Paragraph (18), provides:

> "No carrier by railroad *** shall acquire or operate any line of railroad *** unless and until there shall first have been obtained from the Commission, a certificate that the present or future public convenience and necessity require the *** operation *** and no carrier by railroad shall abandon all or any portion of the line of railroad or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Section 1, Paragraph 20, provides:

> "The Commission *** may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require *** Any operation contrary to the provisions of this paragraph may be enjoined by any court of competent jurisdiction at the suit of *** any party in interest."

Section 5, Paragraph 2 (a), requires approval and authorization of the Interstate Commerce Commission for two or more carriers to consolidate, merge, or for any carrier to purchase, lease or contract to operate the property of another carrier.

Section 5, Paragraph (2) (b) provides:

"If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a), *and will be consistent with the public interest,* it shall enter an order approving and authorizing such transaction."

Section 5 (4) provides:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of paragraph (a) thereof."

Section 5, Paragraph 11, provides:

"The authority conferred by this Section *shall be exclusive and plenary,* and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation or corporate merger, *of a majority unless a different vote is required under applicable State law, in which case the number so required shall assent* of the votes of the holders of the shares entitled to vote of the capital stock of such corporation ***) to carry such transaction into effect and to own and operate any properties and to own and exercise any control or franchises acquired through said transaction *without invoking any approval under State authority*; and any carriers or other corporations, and their officers or employees and any other persons participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved

from the operation of the anti-trust laws and of all other *restraints, limitations and prohibitions of law, Federal, State or municipal in so far as may be necessary,* to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchise acquired through such transaction. Nothing in this Section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, *but any power granted by this Section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State".*

APPLICABLE SUB-SECTIONS OF SEC. 77 OF THE BANKRUPTCY ACT. (Italics ours).

Sub-Section (a) provides:

"If the petition is so approved, the Court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal Court would have had if it had appointed a receiver in equity for the property of the debtor for any purpose. Process of the Court shall extend to and be valid when served in any judicial district."

Sub-Section (b) provides:

"A plan of reorganization within the meaning of this Section (1) shall include provisions

modifying or altering the rights of creditors generally or of any class of them, secured or unsecured, either through the issuance of new securities of any class or otherwise *** (5) shall provide adequate means for the execution of the plan *which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations* *** *the amendment of the charter of the debtor* *** may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this Section. The adoption of an executory contract or unexpired lease by the Trustee or Trustees of a debtor shall not preclude the rejection of such a contract or lease in a plan of reorganizaiton approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor, because such contract or lease had been previously adopted."

Sub-Section (b) further provides:

"The term 'Creditors', shall include for all purposes of this Section all holders of claims of whatever character against the Debtor or its property whether or not such claims would otherwise constitute possible claims under the Act, including the holders of claims under a contract, executory, in whole or in part, and including an unexpired lease."

Sub-Section (c) (6) provides:

"If a lease of a line of railroad is rejected, and if the lessee, with the approval of the Judge

shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the Judge to begin the operation of such line, unless the Judge upon the petition of the lessor shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of Section 1 of the Interstate Commerce Act as amended."

Sub-Section (f) provides:

"Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the Judge relative thereto, under and subject to the supervision and the control of the Judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. *** upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale; consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended."

Sub-Section (f) further provides:

"The Judge may require the trustee or trustees appointed hereunder, the debtor, any mort-

gagee, the trustee of any obligation of the debtor *and all other proper and necessary parties* to make any such transfer or conveyance and may require the debtor to join in any such transfer or conveyance made by the trustee or the trustees."

Section 2 (15) of the Bankruptcy Act provides that bankruptcy courts may "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act: provided, however, that an injunction to restrain a court may be issued by the Judge only".

Section 2 (15) of the Bankruptcy Act (U.S.C.A. Title 11, Section 11) provides that courts of bankruptcy are invested with such authority in equity as to enable them to exercise original jurisdiction in bankruptcy proceedings, including the power to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

Judicial Code Section 262 (U.S.C.A. Title 28, Section 377):

"The Supreme Court, the Circuit Courts of Appeals, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

APPENDIX No. 2

Applicable Sections of the Code of Georgia of 1933.

94-328. "AUTHORITY TO SELL OR LEASE RAILROAD. Any railroad corporation organized under the laws of this State, which has heretofore leased its property for a long term of years to another corporation, which lease has terminated, and the lessor is not a going concern or equipped to conduct the operations of a railroad company, is hereby authorized to sell or lease its property, rights, and franchises to another railroad corporation upon such terms as may be agreed upon by the board of directors of the selling or lessor corporation and assented to by the holders of a majority of its stock. (Acts 1933, p. 235)."

94-329. "RIGHTS ACQUIRED. The railroad corporation to which a sale or lease is made under the terms of the preceding section shall acquire all the property, rights, and franchises of the selling, or lessor, corporation. (Acts 1933, p. 235)."

The above two Code Sections are codified from the Act of 1933, p. 235.

Code Section 94-311. "Any railroad company incorporated under this Title shall have the power to make contracts with any railroad company which has constructed or shall hereafter construct any railroad within this State or any other State, that will enable said companies to run their roads in connection with each other, and merge their stocks, or to consolidate with any such company within or without this State, or to lease or purchase the

property of any other such company and hold, use, and occupy the same in such manner as they may deem most beneficial to their interests: Provided, that no railroad shall purchase a competing line of railroad, or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this State; and any violation of this section shall subject the corporation to all the penalties incident to such violation of the law. (Acts 1892, p. 49)."

Code Section 94-318. "Any railroad Company incorporated under the provisions of this title shall have authority to sell, lease, assign or transfer its stock, property and franchises to, or to consolidate the same with those of any other railroad company incorporated under the laws of this or any other state or of the United States, whose railroad within or without the state shall connect with or form a continuous line with the railroad incorporated under the law, upon such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this title may purchase, lease, consolidate with, absorb and merge into itself the stock, property and franchises of any other railroad company incorporated under the laws of this or any other state or the United States, whose railroad within or without this state shall connect with and form a continuous line or system with the railroad of such company incorporated under this title upon such terms as may be agreed upon."

The above two Code Sections are a part of Title 94 of the Code of Georgia of 1933, which contains the law for the incorporation of railroad companies and was passed in 1892 (Acts 1892, pp. 49, 51).

APPENDIX No. 3

EXTRACTS FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, IN THE MATTER OF CENTRAL OF GEORGIA RAILWAY COMPANY, DEBTOR, IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD. NO. 4829.

ORDER OF MARCH 5, 1948.

Upon consideration of the foregoing petition of the Reorganization Managers of Central of Georgia Railway Company praying that the Court construe or cure certain defects in the Plan, authorize the acquisition of the properties of South Western Railroad Company subsequent to the consummation date and provide for the rejection of the lease of South Western Railroad Company and the operation of its lines of railroad for the account of the lessor by the Reorganized Company, and all parties having been heard or given an opportunity to be heard, and the Court being fully advised in the premises, it is ORDERED:

1. In the exercise of the Court's power under the provision of the Plan entitled "Construction of plan" the Plan is hereby deemed to provide that, if the properties of the South Western Railroad Company can be acquired on the terms set forth in the Plan, it is the duty of the Reorganization Managers to effect their acquisition; that, if practicable, such properties should be so acquired prior to or upon the consummation date; that, if such properties cannot be acquired on the terms set forth in the Plan, the lease of the South Western should be rejected as of the consummation date; that

the rental under the lease of the South Western should be paid until the acquisition of the properties of the South Western if such acquisition precedes the consummation date, or until the rejection of the lease of the South Western becomes effective if such lease be rejected, and that any bonds to be issued under the Plan for the properties of the South Western should not bear interest for any period for which the lease rental shall have been paid.

2. In the exercise of the Court's power under the provision of the Plan entitled "Construction of plan" the words "as a result of the acceptance of the plan by the leased-line security holders" are hereby deleted from the second sentence of the second paragraph under the heading "Reorganized company".

3. In the exercise of the Court's power under the provision of the Plan entitled "Construction of plan", the sentence in the Plan under the heading "Reorganized company" reading "Securities allotted to the leased lines shall not bear interest or dividends for any period prior to acquisition of the respective leased line" is hereby deemed to provide that no interest or dividends shall accrue on securities allotted for the properties of a leased line for any period for which rental under the lease of such line shall be paid and that if South Western Railroad Company should be acquired subsequent to the consummation date the bonds to be issued for the properties of the South Western should bear interest from the consummation date, the interest on the Income Bonds to be contingent.

4. (a) The lease of the South Western Railroad Company is rejected as of the consummation date; and

(b) From and after the consummation date the Reorganized Company shall operate the lines of the South Western for the account of the South Western subject to the jurisdiction of this Court;

provided that, if the properties of the South Western be acquired on the terms set forth in the Plan subsequent to the consummation date and within a reasonable time after the termination of the litigation now pending, the effect of such acquisition shall be the same as if such properties had been acquired on such terms on the consummation date, and the result of operation by the Reorganized Company of South Western's railroads for the account of South Western, whether a profit or a loss, shall not affect the amount of bonds distributable under the Plan to South Western Railroad Company, or the interest payable thereon from the consummation date.

This 5 day of March, 1948.

Enter,

F. M. SCARLETT,
Judge, United States District Court.

Filed in office this 5 day of March, 1948.

LENA W. SEMKEN,
Deputy Clerk.

EXTRACT FROM ORDER OF MAY 18, 1948.

"The determination of the Reorganization Managers that the method of acquisition of the properties of South Western Railroad Company, Augusta and Savannah Railroad and The Chattahoochee & Gulf Railroad Company be by purchase is hereby approved."

EXTRACTS FROM CONSUMMATION ORDER OF JUNE 24, 1948.

"The Reorganization Managers and the Reorganized Company are hereby authorized and directed to proceed with and complete the consummation of the Plan, except with respect to South Western Railroad Company, in accordance with the terms and provisions thereof***."

"Except as otherwise provided in this Order, at 12:01 A.M., Eastern Standard Time, on July 1, 1948 (referred to in this Order as the Consummation date), all right, title, and interest of the Trustee of the Debtor's properties *** and all rights, privileges, and franchises of the Debtor shall, the laws of any State or the decisions or orders of any State authority to the contrary notwithstanding, vest in and become the absolute property of the Debtor, Central of Georgia Railway Company, as reorganized***."

"From and after the consummation date the reorganization proceedings shall not be terminated but shall remain open, and said Trustee and his Counsel shall continue in office until the further order of the Court."

"The Reorganized Company shall have the right, if it so elects, to be substituted at its own cost and expense as a party in lieu of the Trustee

of the properties of the Debtor, in any or all litigation or proceedings by or against the said Trustee now pending on appeal or otherwise, or to continue such litigation or proceedings in the name or names of the present parties thereto."

I, Scott A. Edwards, Clerk of the United States District Court for the Southern District of Georgia, do hereby certify that the foregoing is a true and correct copy of the order of said Court dated March 5, 1948 and of the extracts from the orders of said Court dated May 18, 1948 and June 24, 1948, in the proceedings for the reorganization of Central of Georgia Railway Company.

In witness whereof I have signed this Certificate and attached the seal of said Court this 1st day of September 1948.

SCOTT A. EDWARDS,
Clerk United States District Court for the Southern District of Georgia.

(SEAL OF COURT)